APPEAL NO. 93433

On March 9, 1993, a contested case hearing was held in (city) Texas, with (hearing officer) presiding. The sole issue to be determined at the hearing was whether Dr. R was the treating doctor for the claimant, MG, who is the respondent. The hearing officer determined that Dr. R had been approved by the Texas Workers' Compensation Commission (Commission) pursuant to Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.62 (Vernon Supp. 1993) (1989 Act), that such action was reasonable and necessary, and that Dr. R was therefore claimant's treating doctor.

The carrier appeals this decision as against the great weight and preponderance of the evidence. Much of the brief is devoted to arguments that claimant was treated for no objective reasons by a series of doctors, that claimant has reached maximum medical improvement (MMI) and that this fact was "ignored" by the hearing officer, that doctors prior to Dr. R were consulted as treating doctors without resort to proper procedures, and that the hearing officer was incorrect in denoting Dr. R as claimant's "third" doctor. The claimant responds that the decision is correct, and points out that many of the issues argued on appeal are irrelevant to the sole issue determined at the hearing.

DECISION

The decision of the hearing officer to uphold the Commission's approval of the treating doctor is correct; however, we reverse the determination of the hearing officer to accept jurisdiction of the carrier's assertion that the approval was wrong, finding that the hearing officer had no authority, in either the statute, or the rules, to review the approval of Dr. R. We render a new decision that the approval of Dr. R stands under Art. 8308-4.62, because the Commission's approval is not subject to review under Article 6 of the 1989 Act.

The sole issue before the hearing officer was whether Dr. R was claimant's treating doctor. Although most of the hearing was taken up with carrier's demonstration that claimant did not follow proper procedures before consulting with other physicians prior to Dr. R, or with whether claimant needed health care apparently rendered, none of these were issues properly before the tribunal. We observe that issues as to whether medical care is necessary and reasonable to treat a work-related injury are not, in any case, within the jurisdiction of benefit review officers and contested case hearings officers; the procedure for addressing such disputes is through Art. 8308-4.68 and 8.26, and Texas W.C. Comm'n Rules, 28 TEX. ADMIN. CODE §§ 133.304 and 133.305 (Rules 133.304 and 133.305).

The facts relevant to the appointment of Dr. R are briefly summarized. Claimant sustained a back injury on July 25, 1991, while employed by Texas Instruments. She was first seen by an employer-referred doctor, Dr. G. She then went to her initial choice of doctor, Dr. R, and thereafter, on referral from Dr. G, to Dr. P. Carrier agreed, at the hearing, that these two doctors were claimant's first and second choices of treating doctor within the meaning of Art. 8308-4.62(a). Both doctors released claimant to work, and she frankly indicated this was one reason she sought other treatment, in addition to her inability to

perform light duty because of pain.

It is undisputed that she thereafter consulted with at least three other doctors, including her family doctor, about her back injury. She did not seek approval from the carrier or Commission for approval to change to these doctors. We could, as claimant did, evaluate whether each of these doctors is a "choice." For example, we note that one Dr. K refused in writing in December 1991 to treat claimant, thereby clearly becoming "unavailable" within the meaning of Art. 8308-4.64(4) such that the subsequent doctor would not be considered "a choice." The claimant then sought treatment from one Dr. E, who was also referred by the employer doctor, and who was apparently paid by claimant herself; carrier's adjuster testified that it would have considered Dr. E a "choice" if it had been asked to pay, but it was not. Claimant was determined to have reached maximum medical improvement (MMI) by the Commission's designated doctor, on February 14, 1992, with zero impairment. Of course, the designated doctor is not a "choice" and so cannot be factored into the sequence of doctors. Moreover, as the hearing officer pointed out, MMI does not end the liability of a carrier for health care reasonably required to treat the compensable injury. Art. 8308-4.61; Texas Workers' Compensation Commission Appeal No. 91125, decided February 18, 1992.

However, we need not engage in such analysis, because, on October 7, 1992, claimant filed a TWCC-50 form seeking approval of a "third or subsequent" treating doctor, in accordance with Art. 8308-4.62(b) and Rule 126.7. (Claimant began treating with Dr. R some months before seeking this approval, and indicated that a benefit review conference caused her to follow procedures for choice of doctor). The form clearly disclosed that claimant sought treatment from other physicians between Dr. P and Dr. R. Carrier responded with its position that the request should be denied, and cited the reasons why. Thus, the positions of both parties were available for consideration by the Commission, which, on October 21, 1992, approved the choice of doctor, noting that circumstances beyond the injured parties' control necessitated changes although neither Rule 126.7 or Art. 8308-4.62(b) require the Commission to articulate its reasons for approval. From the Commission's perspective, Dr. R was, under Art. 8308-4.62(b), the "third" doctor. He was certainly a subsequent treating doctor, however he was numbered.

Carrier's position in attacking the Commission approval of Dr. R is hard to fathom. A treating doctor is required to approve or recommend treatment. Art. 8308-4.61(b). Although carrier complains about the failure of claimant to seek approval for several doctors, it seeks to invalidate the treating doctor for whom procedures were followed. It has petitioned for relief with no demonstration, as required by Art. 8308-4.65, that the health care provider (Dr. R) was selected "in a manner inconsistent with the requirements of this chapter."

The instruction given by the hearing officer at the beginning of the hearing, typically

used in compensability cases, was erroneous insofar as it indicated that the claimant had the burden of proof. She did not. A claimant does not have the burden of proving the validity of an agency order or approval. If the Commission's discretionary approval of treating doctor action is reviewable within the agency, it would be incumbent upon the carrier to carry the burden of invalidating the agency's action.

However, we find nothing in the statute or rules indicating that the Commission's approval of a change of doctor (as opposed to the factual determination of who was a treating doctor, in connection with other compensability disputes) is reviewable through the hearings process set forth under Article 6 of the 1989 Act. Rule 126.7, regarding selection of treating doctor, gives no such review. The issue is not a "benefit dispute" as defined in Rule 140.1. More importantly, Art. 8308-4.62 grants no review of the Commission's approval. The sole hearing right granted regarding selection of doctor is under Art. 8308-4.65, wherein a carrier may be asked to be relieved of liability only where the procedures set forth for selecting a doctor (under Arts. 8308-4.62 or 4.63) are not followed. We see no provision made for hearing where the procedures are followed, but the carrier disagrees with the decision. Absent an express indication that in-house review by a contested case hearing of the approval of a change in treating doctor was intended, we will not imply such intent. *See* City of Amarillo v. Hancock, 239 S.W.2d 788 (Tex. 1951). Any due process considerations are, in our opinion, satisfied by allowing the carrier to respond to the claimant's request for approval, as occurred here, or by the other methods available to dispute bills or services rendered by providers, in accordance with Art. 8308-4.65, 4.68 and 8.25, and Rules 133.304 and 133.305.

We are also persuaded that the Commission's approval is not reviewable through the agency hearings process because that such process would omit one major party in interest--the health care provider. A health care provider should be able to rely on a Commission approval of his status as treating doctor. If such approval were to be held subject to collateral attack through the Article 6 hearings process and Appeals Panel, then provisions relating to medical bill or treatment disputes as set forth under Art. 8308-4.68 and 8.26, to include review by the Commission's medical review division, would be effectively negated.

If there was error by the agency with respect to this decision, it was in granting a benefit review conference and contested case hearing on the approval at all. If the carrier intended to invoke a hearing under Art. 8308-4.65, or to protest payment of Dr. R's services prior to his approval, then it should have followed the procedures set out in Rule 133.304(h). In this case, the Commission approved Dr. R as the treating doctor. This answered the issue posed at the hearing as to whether he was the treating doctor. The hearing officer did not have to go the "extra mile" by asserting that the Commission's action was reasonable. The hearing officer's analysis was correct; his decision is erroneous only because he assumed jurisdiction of a Commission decision that we do not believe is subject

to review in a hearing. Therefore, we reverse the decision of the hearing officer, and render a new decision that the approval of Dr. R as treating doctor by the Commission in accordance with Art. 8308-4.62 and Rule 126.7 was not subject to review under Article 6 of the 1989 Act. We point out that the carrier is not at liberty because of this reversal to ignore the Commission's approval of Dr. R as a treating doctor. The carrier is free to protest payment of certain services in accordance with Art. 8308-4.65, 4.68, and 8.26 and applicable rules. These provisions do not, however, authorize a collateral attack on the merits of the approval itself.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge